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In the Supreme Court of the United States

OCTOBER TERM, 1993

CONSUMER FEDERATION OF AMERICA, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly articulated the "public interest" standard that applies to judicial review of consensual modifications of antitrust consent decrees.

2. Whether the court of appeals correctly interpreted section VIII(C) of the consent decree entered in the government's antitrust suit against AT&T by concluding that it does not apply to consensual motions to modify the decree's line-of-business restrictions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

MCI v. *United States*, 498 U.S. 911 (1990)	4, 11
United States v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619 (W.D. Ky. 1985)	9
United States v. *American Cyananid Co.*, 719 F.2d 558 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984)	10, 11
United States v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983)	2, 4
United States v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29 (W.D. Mo. 1975), aff'd, 534 F.2d 113 8th Cir.), cert. denied, 429 U.S. 940 (1976)	9
United States v. *Atlantic Refining Co.*, 360 U.S. 19 (1959)	12
United States v. *Bechtel Corp.*, 648 F.2d 660 (9th Cir.), cert. denied, 454 U.S. 1083 (1981)	6, 7, 10
United States v. *Columbia Artists Management, Inc.*, 662 F. Supp. 865 (S.D.N.Y. 1987)	9
United States v. *G. Heileman Brewing Co.*, 563 F. Supp. 642 (D. Del. 1983)	9
United States v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975)	7, 9, 10
United States v. *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. May 17, 1977)..	6, 7-8, 9
United States v. *National Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978)	9

Cases—Continued: Page

United States v. *National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856 (E.D. Mich. Aug. 9, 1985) 9
United States v. *Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,804 (D.D.C. June 4, 1982) 9
United States v. *Swift & Co.*, 286 U.S. 106 (1932) 11
United States v. *Western Elec. Co.*:
673 F. Supp. 525 (D.D.C. 1987) 3
714 F. Supp. 1 (D.D.C. 1988) 3
969 F.2d 1231 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1363 (1993) 12
United States v. *Yoder Bros.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 (N.D. Ohio Apr. 28, 1986) 6, 9

Statute:

Antitrust Procedures and Penalties Act (Tunney Act), 15 U.S.C. 16 ..... 6, 8

Miscellaneous:

United States Dep't of Justice, Antitrust Division Manual (2d ed. 1987) 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 993 F.2d 1572. The opinion of the district court (Pet. App. 24a-75a) is reported at 767 F. Supp. 308. A prior opinion of the court of appeals in this case (Pet. App. 76a-125a) is reported at 900 F.2d 283.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1993. The petition for a writ of certiorari was filed on August 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following proceedings on remand from the D.C. Circuit's 1990 Triennial Review Opinion, Pet. App. 76a-125a, the district court granted the Bell Operating Companies' (BOCs) motions to modify the consent decree entered in the government's antitrust case against AT&T. The modification, which the United States supported and AT&T (the only other party to the decree) did not oppose, removed the provision barring the BOCs from providing "information services," which include services such as LEXIS by which information stored on a computer may be accessed by telephone.[1] Pet. App. 24a-75a. The court of appeals affirmed. Pet. App. 1a-23a.

1. The *AT&T* antitrust consent decree, as entered in 1982, prohibited the BOCs from providing interexchange (long distance) services and information services, manufacturing or providing telecommunications equipment, manufacturing customer premises equipment, and engaging in most other businesses except local exchange telecommunications. *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 227-228 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). In 1987, after the Department of Justice had conducted an extensive study of competition in the telecommunications industry,

[1] The decree defines "information service" as: "[T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications." *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

the United States and the BOCs moved for removal of the decree's prohibitions with respect to information services, equipment, and non-telecommunications business. The BOCs, over the goverment's opposition, also moved for removal of the prohibition on interexchange services. AT&T opposed removal of the interexchange services and equipment prohibitions, but did not oppose removal of the information services prohibition.

The district court modified the information services restriction to allow the BOCs to provide limited "gateway" transmission services and voice storage and retrieval services. But accepting arguments by various intervenors, many of whom would face competition from the BOCs if the BOCs were allowed to provide information services, the court retained the prohibition on all other information services. The district court also removed the non-telecommunications business prohibition, but retained the equipment and interexchange prohibitions. *United States* v. *Western Elec. Co.*, 673 F. Supp. 525 (D.D.C. 1987); *United States* v. *Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988).

2. In its Triennial Review Opinion, the D.C. Circuit affirmed the district court's denial of the BOCs' motions to remove the decree's prohibitions on interexchange services and equipment manufacturing. Pet. App. 76a-125a. The court of appeals also held that because the United States supported and AT&T did not oppose the BOCs' motions to remove the information services restriction, the common law "public interest" standard incorporated in section VII of the decree applied rather than the more restrictive

standard set out in section VIII(C).[2] *Id.* at 113a-117a. The court of appeals remanded for reconsideration of the information services motions under the public interest standard, which directs the district court to consider whether an uncontested modification "is within the *zone of settlements* consonant with the public interest *today*.'" *Id.* at 10a, quoting *id.* at 117a. This Court denied a petition for a writ of certiorari filed by some of the intervenors. *MCI* v. *United States*, 498 U.S. 911 (1990).[3]

3. After further briefing and argument on remand, the district court granted the motions for removal of the information services restriction. Pet. App. 24a-75a. The district court made clear that it still disagreed with the Department's conclusions that (1) regulatory, technical, and market constraints make it unlikely that the BOCs would engage in anticompetitive conduct; and (2) removal of the restriction would promote competition in information services. *Id.* at 29a-62a. But the district court concluded that it was required to grant the motions under the public interest standard articulated by the court of appeals because it could not conclude that removal of the

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[2] Section VIII(C) provides: "The [line-of-business] restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231.

[3] The primary question presented was whether the court of appeals correctly determined that the public interest standard of section VII, rather than the stricter standard set out in section VIII(C), applies to modifications that are not opposed by any party to the consent decree.

prohibition would be certain to lessen competition. *Id.* at 62a-71a.

4. The court of appeals affirmed. Pet. App. 1a-23a. The court of appeals held that "[a]lthough the district court in certain places mischaracterized the standard under which it was to review the Department's proposal, the evidence was such that, under the standard laid down in the Triennial Review Opinion, rejection of the Department's proposal would have been error." *Id.* at 9a.

The court reaffirmed its Triennial Review Opinion holdings that the "public interest test" applies to modifications assented to by all parties to a decree and that that test "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligation is within the *zone of settlements* consonant with the public interest *today*." Pet. App. 10a, quoting *id.* at 117a. The court of appeals further explained: "[I]t was not up to the court to reject an agreed-on change simply because the proposal diverged from *its* view of the public interest. Rather, the court was bound to accept any modification that the Department (with the consent of the other parties, we repeat) reasonably regarded as advancing the public interest." *Id.* at 10a. The court of appeals cautioned that the Triennial Review Opinion did not require "abject deference to the Department," but it also emphasized that the district court has a limited role and is not to engage in *de novo* review. *Id.* at 11a-12a. Thus, "the district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predic-

tive judgments of an administrative agency." *Id.* at 12a. The court of appeals noted that this "view accords with other courts' understanding of the court-agency relation under the Tunney Act," 15 U.S.C. 16, which governs the entry of consent decrees. Pet. App. 12a (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. May 17, 1977); *United States* v. *Yoder Bros.*, 1989-2 Trade Cas. (CCH) ¶ 68,723, at 61,795 (N.D. Ohio Apr. 28, 1986)).

The court of appeals then reviewed the record evidence in this case as to the potential effects of removing the information services restriction. Finding "unclear what deference the district court actually extended," the court concluded that "the record before the court was such that any district court rejection of the proposed modification would have been reversible error." Pet. App. 13a-14a. The court determined that the Department's conclusion that there was no substantial risk that removal of the information services restriction would lessen competition was supported by "an ample factual foundation," *id.* at 23a, and held that the district court "was clearly erroneous to the extent that it found the Department's conclusion unreasonable," *id.* at 15a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Contrary to petitioners' contention (Pet. 12-17), the court of appeals properly understood the role of

the district court in reviewing consensual motions to enter or modify a consent decree in a government antitrust case. When the United States seeks an injunction in a contested proceeding, the district court is charged with responsibility for finding facts as to the existence of a violation and determining what relief is appropriate. When the United States and the defendant agree to the entry or modification of a decree, however, the district court's role is different because the government does not need to prove that a violation has occurred and the parties are in agreement that the relief the government seeks is appropriate.

As the court of appeals properly acknowledged, when the government and the defendant reach agreement, it is not the role of the court to assume the prosecutorial function of determining "whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." Pet. App. 10a, quoting 900 F.2d at 309; in turn quoting *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); in turn quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (internal quotations marks omitted). As the Ninth Circuit emphasized in *Bechtel*: "The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree." 648 F.2d at 666 (citation omitted). See also, *e.g.*, *United*

States v. *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,979-71,980 (W.D. Mo. May 17, 1977) (while an "independent public interest determination" is required, the court is not to make a "*de novo* determination of facts and issues").

The court of appeals did not require automatic approval of consent decrees, as petitioners suggest (Pet. 13-14). Indeed, the court emphasized that a standard requiring "rubber-stamp deference" would have been legally erroneous. Pet. App. 13a-14a.[4] Under the public interest standard articulated by the court of appeals, the government must explain the competitive basis for and the impact of its proposal.[5] The public is entitled to comment. The district

[4] The court of appeals acknowledged that the district court's opinion was unclear as to how much deference the district court actually extended. Pet. App. 13a. The court of appeals concluded that a remand was unnecessary only after examining in detail the record evidence and determining that there was an "ample factual foundation for the judgment call made by the Department of Justice," and that "[i]nsofar as the district court may be considered to have found the contrary, the finding was clearly erroneous." *Id.* at 23a. Petitioners do not challenge that holding.

[5] The procedures for review of consent decrees are codified in the the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, which is known as the Tunney Act. In proceedings to modify or terminate antitrust decrees, the Department follows analogous procedures. See United States Dep't of Justice, Antitrust Division Manual § III(E) (2d ed. 1987). The United States does not agree that the Tunney Act applies to decree modifications, but we do not disagree with the court of appeals' conclusion that uncontested modifications "should be approved so long as the modifications satisfy the 'public interest' standard embodied in the Tunney Act." Pet. App. 91a; see *id.* at 10a.

court reviews the proposed decree, the government's explanation, and the public's comments in order to ensure that there is no malfeasance and that the government is acting reasonably in consenting to the decree. See, *e.g.*, *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (court inquires "whether [the Department of Justice's] explanations are reasonable under the circumstances").[6] The government does not bear the same evidentiary burden it would bear in a contested proceeding to establish that the relief it seeks is required to vindicate the public interest in competition. See, *e.g.*, *Gillette*, 406 F. Supp. at 715.[7] The court plays the role properly

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[6] Other courts have used similar formulations of the public interest inquiry, recognizing the discretion afforded to the Department, which represents the public interest in competition (*United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116-117 (8th Cir.), cert. denied, 429 U.S. 940 (1976)). See, *e.g.*, *United States* v. *Columbia Artists Management, Inc.*, 662 F. Supp. 865, 869-870 (S.D.N.Y. 1987); *United States* v. *Yoder Bros.*, 1989-2 Trade Cas. (CCH) ¶ 68,723, at 61,795 (N.D. Ohio Apr. 28, 1986); *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States* v. *National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856, at 64,248 (E.D. Mich. Aug. 9, 1985); *United States* v. *G. Heileman Brewing Co.*, 563 F. Supp. 642, 647 (D. Del. 1983); *United States* v. *Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,804, at 71,960 (D.D.C. June 4, 1982); *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143-1144 (C.D. Cal. 1978); *United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29, 44-45 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976).

[7] Petitioners' argument that entry of a decree cannot be in the public interest if the district court finds that it will be anticompetitive (Pet. 13-14) ignores the predictive nature of the inquiry, as well as the difference between litigated cases

assigned to it: assuring that the decree it enters falls within the "reaches of the public interest." *Bechtel*, 648 F.2d at 666, quoting *Gillette*, 406 F. Supp. at 716.[8]

2. Contrary to petitioners' contention (Pet. 18-22), the court of appeals' decision does not conflict with the Second Circuit's decision in *United States* v. *American Cyanamid Co.*, 719 F.2d 558 (1983), cert. denied, 465 U.S. 1101 (1984). *Cyanamid* turned on the applicability of Part XI of the *Cyanamid* decree to an unopposed motion to vacate that decree. Part XI expressly conditioned removal of the decree's restrictions on a showing that "the effect of such relief will not be substantially to lessen competition." 719 F.2d at 561. The court of appeals held, erroneously in our

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and consent judgments. The question is not, as petitioners suggest (*ibid.*), whether the court must enter a decree that is anticompetitive, but whether it is the role of the Department of Justice or the court to predict whether, on balance, the effect of the decree will be procompetitive. In the consent decree situation, the public interest standard assigns that role to the Department, so long as it has a reasonable basis for its prediction.

[8] Petitioners' contention (Pet. 12-17) that the D.C. Circuit "violate[d] the Tunney Act" and "reversed [its] statutory command" ignores the cases that interpret that Act in a manner fully consistent with the D.C. Circuit's decision. Contrary to petitioners' contention, the Tunney Act requirement that the court "determine that the entry of [a proposed judgment] is in the public interest" does not in itself resolve the question of the scope of the court's inquiry. The D.C. Circuit's formulation of the public interest inquiry expressly incorporates the legislative intention to prohibit judicial "rubber stamping," and the legislative history supports the courts' uniform conclusion that the Act preserves the Department of Justice's right to settle litigation provided that it acts in good faith and with reasonable competitive justification. See, *e.g.*, *Gillette*, 406 F. Supp. at 715.

view, that Section XI of that particular decree applied to consensual as well as contested termination motions and that the district court had erred in applying the public interest standard. But as the United States argued in opposing the private defendant's petition for a writ of certiorari in that case, the *Cyanamid* decision and its rationale are inseparable from the special standard contained in the *Cyanamid* decree. See 719 F.2d at 559, 564-567.

3. Petitioners also renew their attack (Pet. 22-26) on the D.C. Circuit's 1990 holding that the public interest standard, rather than the more stringent standard of section VIII(C), applies to motions for decree modification that are not opposed by any of the parties to the decree (the United States, the BOCs and AT&T).[9] Review is not warranted.

In the Triennial Review Opinion, the D.C. Circuit carefully analyzed the language of the *AT&T* consent decree, considering its history and accepted principles of decree construction. The D.C. Circuit concluded that section VIII(C) was added only to supplant the test usually applied to a contested modification as set forth in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), and did not alter the common law rule that an uncontested modification should be subject to the more lenient public interest standard. See Pet. App. 113a-117a. We submit that this holding is correct. In any event, the court of appeals' holding on the scope of

[9] MCI and other petitioners raised that issue in their 1990 petition for certiorari, which this Court denied. *MCI* v. *United States*, 498 U.S. 911 (1990).

section VIII(C) was based squarely on interpretation of the terms of the *AT&T* decree.[10]

Because it was based on the language and history of the *AT&T* decree, the holding in the Triennial Review Opinion on the scope of section VIII(C) establishes no clear precedent for any other decree. In fact, the effect of the court of appeals' ruling on that issue is uncertain even with respect to further proceedings in this case. The D.C. Circuit has held that section VIII(C)—and not the public interest standard—governs BOC motions for modification of the line-of-business restrictions if the modifications are supported by the United States but opposed by AT&T, *United States* v. *Western Elec. Co.*, 969 F.2d 1231 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1363 (1993), and AT&T consistently has opposed removal of the interexchange and manufacturing restrictions that the decree places on the BOCs.

[10] As in the petition for a writ of certiorari that was filed in 1990, petitioners argue (Pet. 23) that the Triennial Review Opinion conflicts with *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959). There is no merit to that contention. In *Atlantic Refining*, the Court refused to construe a consent decree contrary to its terms "simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place." *Id.* at 23-24. The court of appeals did not interpret the *AT&T* consent decree contrary to its terms.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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